FILED
SEP 19 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

346 U.S
BIG-BR
6

No. 362

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

RKO RADIO PICTURES, INC., ET AL.,
Defendants,

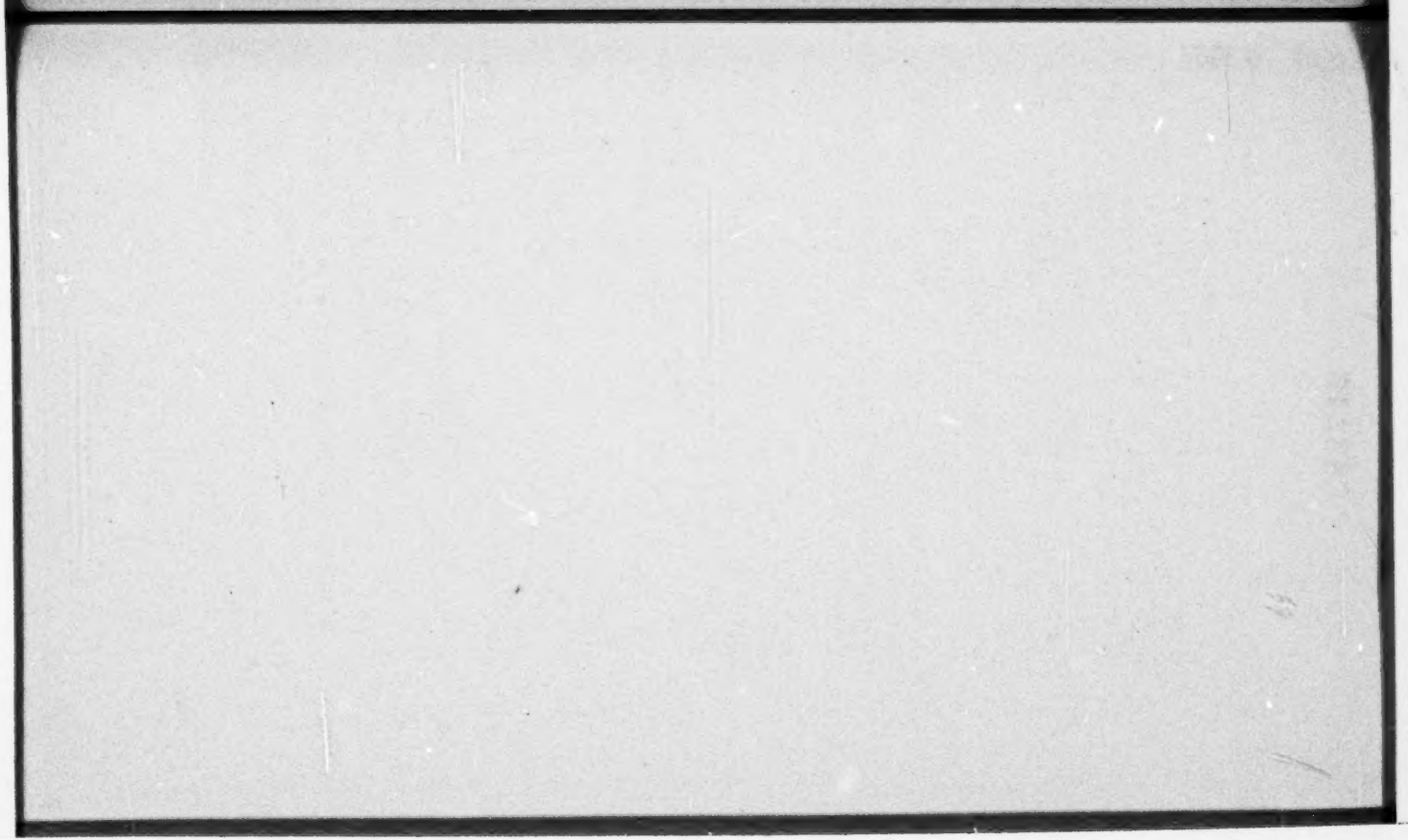
WINSTON THEATRE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FLORENCE B. BIGELOW,
MARION B. KOERBER,
JOHN E. BLOOM, and
WILLIAM C. BLOOM,
Petitioners,

By THOMAS C. MCCONNELL,
Their Attorney.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO



INDEX.

	PAGE
Petition	1
Jurisdiction	2
Opinion Below	2
Summary Statement of the Matter Involved	2
Questions Presented	7
Reasons for Granting the Writ	8
Prayer	9
Brief	10
Statement of the Case	10
Jurisdiction	10
Opinion Below	10
Specification of Errors	11
Argument	11
I. A Person Is Bound by an Injunctive Decree If He Was in Active Concert or Participation in the Conspiracy, Was in Privity With a Party Defendant, or Is a Successor of a Party Bound by the Decree	12
II. The Burden of Proof Is Upon the Person Seeking to Have an Injunctive Decree Modified to Show That Substantial Changes Have Occurred So That the Decree Is No Longer Necessary	14
III. The Mere Reshuffling of Assets in the Reorganization of a Corporate Hierarchy Bound by An Injunction Is Not Sufficient Grounds Upon Which to Vacate a Decree by Modification	18
IV. Findings of Fact Are Binding Upon the Court of Appeals When They Are Supported by the Substantial Weight of the Evidence and Are Therefore Not Clearly Erroneous	19
Conclusion	23

CITATIONS.

Bigelow v. RKO Radio Pictures, Inc., 324 U. S. 251.. 3
Bigelow v. RKO Radio Pictures, Inc., 170 F. 2d 783, cert den. 332 U. S. 817..... 3
Bruce's Juices v. American Can Co., 330 U. S. 743.... 9
Hyde v. United States, 225 U. S. 347..... 17
Regal Knitwear v. N. L. R. B., 324 U. S. 9.....8, 12, 14
United States v. Kissel, 218 U. S. 601..... 17
United States v. Paramount Pictures, Inc., et al. 334 U. S. 131..... 4
United States v. Swift & Company, 286 U. S. 106 .....7, 8, 14, 16, 17

STATUTES AND MISCELLANEOUS.

68 Stat. 98, 28 U. S. C. A., § 1254 (1)..... 2
Sections 1, 2 and 7 of the Sherman Act, 26 Stat. 209-210, 15 U. S. C. A., Sections 1, 2 and 15..... 2
Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. A., Sections 15 and 26.....9, 19
Sections 52 (a) Federal Rules of Civil Procedure.... 22
Section 65 Federal Rules of Civil Procedure.....12, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

RKO RADIO PICTURES, INC., ET AL.,
Defendants,

WINSTON THEATRE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Florence B. Bigelow, Marion B. Koerber, John E. Bloom and William C. Bloom, respectfully pray that a writ of certiorari may issue to the United States Court of Appeals for the Seventh Circuit to review its mandate and opinion reversing an order of the United States District Court overruling and dismissing an intervening petition by respondent, Winston Theatre Corporation. The District Court had held that respondent was

bound by the terms of the decree of injunction entered herein on November 17, 1947 after this Court had affirmed findings by the District Court that the conspiracy in which respondent and other motion picture corporations had engaged violated the anti-trust laws and had damaged petitioners to the extent of $360,000. The District Court had rejected respondent's contentions that it was not bound by the decree and that if it ever had been so bound the divorcement of the production and exhibition segments of the RKO motion picture corporate hierarchy constituted in and of itself sufficient grounds upon which to predicate a modification of the decree so as to remove respondent from its scope.

JURISDICTION.

The Jurisdiction of this Court is invoked under 68 Stat. 98, 28 U. S. C. A. § 1254 (1).

The judgment of the Court of Appeals was entered on June 23, 1953.

OPINION BELOW.

The opinion of the Court of Appeals appears in the record at pages 323-328 and is reported in 205 F. 2d 231. The District Court's opinion appears in the record at pages 171-173 and its Findings of Fact and Conclusions of Law appear at pages 299-301 of the record.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner originally commenced this action under §§ 1, 2 and 7 of the Sherman Act, 26 Stat. 209-210 and Sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. A. Sections 1, 2, 15 and 26 to recover treble damages and to obtain a decree of injunction to preclude threatened further injury arising out of a price-fixing conspiracy in

iolation of the anti-trust laws. This Court affirmed the nding of conspiracy and the award oi damages in an pinion reported as *Bigelow* v. *RKO Radio Pictures, Inc.*, 24 U. S. 251. After hearing upon remand a decree of njunction was entered which was affirmed by the Court of Appeals at 162 F. 2d 520 as having been "properly drawn o meet the acts committed under the conspiracy and hreatened."

At the time the decree was entered respondent Winston Theatre Corporation was the owner and operator of the Grand Theatre in the City of Chicago (R. 102-104). Respondent was a wholly owned subsidiary of RKO-Keith-Orpheum Theatres, Inc., which was in turn a wholly owned subsidiary of the holding company, Radio-Keith-Orpheum Corporation, as was RKO Radio Pictures, Inc., a defendant n this case (R. 45). The RKO companies also operated he Palace Theatre in the City of Chicago (R. 46). Throughout the trial of this cause and in all subsequent proceedings these theatres have been treated as theatres owned, leased or operated by a defendant. Mr. Justice Stone observed in his opinion when this case was before his Court originally, 327 U. S. 251, 255: "Respondent RKO also owns two large first run theatres in the Chicago loop."

In January 1948 petitioners filed a petition against defendant RKO Radio Pictures, Inc., charging contempt of the decree because of the manner in which its pictures were being exhibited in the Palace Theatre (R. 46). It was conceded by respondent that the relationship of the Palace Theatre to the decree was identical to the Grand Theatre which respondent owns and operates (R. 46). The trial court held the Palace Theatre to be within the scope of the decree. The finding of contempt was affirmed by the Court of Appeals (170 F. 2d 783) and a petition for a writ of certiorari was denied by this Court (332 U. S. 817). In the contempt proceeding, Miles Seeley, an attor-

ney representing RKO Radio Pictures, Inc., also represented respondent Winston Theatre Corporation (R. 143). In that proceeding he represented to the Court that if a clear ruling was obtained as to the status of the Palace and Grand theatres such ruling should stand as a declaratory judgment binding on respondent and he would dismiss a declaratory judgment action raising this issue which he had instituted on behalf of respondent (R. 143). In this manner the issue as to whether the Grand Theatre was within the scope of the decree was submitted to the Court by petitioners and respondent, and a clear ruling that the RKO Palace and Grand Theatres were encompassed by the decree was obtained. 170 F. 2d 783 (Cause No. 9690, R. 72). Subsequently on February 11, 1949, Miles Seeley as attorney for RKO Radio Pictures, Inc. and on behalf of respondent Winston Theatre Corp. (R. 144), entered into a stipulation with petitioners to permit some flexibility in the operation of the Palace and Grand theatres and yet assure petitioners of the protection afforded by the decree. This stipulation was submitted to the Court by the parties thereto and it was approved by the Court (R. 143, 144, 222). Subsequently the lease on the Palace Theatre was permitted by RKO to revert to the landlord. Respondent could no longer comply with the terms of the stipulation and it became null and void.

Radio-Keith-Orpheum Corporation, the holding company of which all the other RKO Corporations were wholly owned subsidiaries, RKO Radio Pictures, Inc., and other RKO Corporations were defendants in the case of *United States* v. *Paramount Pictures, et al.*, Equity No. 87-273 in the Southern District of New York. After this Court at 334 U. S. 131 had affirmed the findings of the lower court that RKO and the other major distributors of motion pictures were engaged in a price-fixing conspiracy to monopolize the motion picture industry in violation of the Sher-

man Anti-Trust Law (R. 97-98), a consent decree was entered in the Southern District of New York on November 8, 1948 as to the RKO defendants in that action (Pet. Ex. 1, R. 176).

The decree in the *Paramount* case embraced a plan for corporate reorganization of the RKO hierarchy conceived by the attorneys who had represented all of the RKO companies in that case (R. 84-85). Pursuant to this plan the parent of all the RKO companies was to be divided in two parts and replaced by two newly created holding companies (Pet. Ex. 1, R. 176). The shareholders of the old holding company received one share in each of the two holding companies created for each share they had in Radio-Keith-Orpheum Corporation (Pet. Ex. 20, R. 242). Thereafter RKO Theatres Corporation was organized on November 18, 1950, and it filed in the *Paramount* case a consent to be bound by the terms of the decree entered therein (Pet. Ex. 2, R. 196). RKO Pictures Corporation was also organized and together with RKO Theatres Corporation entered into an agreement with Radio-Keith-Orpheum Corporation whereby they acquired the assets and liabilities of all the RKO companies including any and all obligations and liabilities under the anti-trust laws (Pet. Ex. 21, R. 254-275, at 258). RKO Theatres Corporation pursuant to this plan received all of the theatre assets of RKO including all of the stock of RKO Theatres Inc., which has been the direct parent of petitioner since it was organized on March 2, 1943 and was its parent at the time of the trial, the entry of the decree, and the contempt proceeding in this cause (Pet. Ex. 21, R. 255; Pet. Ex. 20, R. 249; Cause No. 9690, R. 51).

Respondent Winston Theatre Corporation filed a petition on June 6, 1952, praying that the Court enter an order declaring that the decree of injunction does not operate against respondent or its theatre. The issue was submitted

to the Court on the entire record heretofore made in this cause and further evidence adduced at the hearing on the petition.

The District Court held that at the time of the original trial respondent was found to be a conspirator in active concert and participation with defendants, and on the basis of evidence adduced on the present petition the Court again made the same finding; that respondent by intervening in this cause was bound by this and all other adjudications of fact and law heretofore made in this cause; that respondent had previously submitted to the Court the issue as to whether it and its theatre were subject to the decree and that the adjudication that it was bound by the decree thereupon became *res judicata* between the parties. The Court further held that respondent had made no showing of a change in conditions upon which a modification of the decree could be predicated. The District Court rejected respondent's contention that the alleged divorcement of the RKO exhibition and production companies, pursuant to the consent decree in the *Paramount* case, was in itself grounds for modifying the decree. The Court further found that the same stockholders still own the allegedly divorced companies, and the same officers and directors control and operate the RKO companies including respondent Winston Theatre Corporation as operated and controlled these corporations during the period the conspiracy was operative, when the injunction was entered and when they were found guilty of contempt. The Court held the so-called divorcement did not result in such a change of conditions as to form a basis upon which to predicate a modification of the decree in its application to respondent.

The Court of Appeals completely ignored all of the evidence and the findings predicated upon that evidence as to respondent's active concert and participation with the de-

fendant in carrying on the conspiracy. The Court of Appeals erroneously assumed that the only manner in which respondent could be bound by the injunctive decree in the case was by virtue of its corporate affiliation with the defendant RKO Radio Pictures, Inc. The Court of Appeals compounded its error by holding that merely presenting to the District Court a copy of the Consent Decree in the *Paramount* case and a copy of the plan of corporate reorganization pursuant thereto would constitute a sufficient showing of changed conditions to require a modification of the decree under the rule established by *U. S. v. Swift & Company*, 286 U. S. 106. The Court further held that the burden was on petitioners to establish that the conditions necessitating the injunction still remain and that absent such a showing by petitioners the decree should be modified. This holding is in direct contravention with the doctrine of the *Swift* case which clearly places on those subject to the injunction the burden of showing that changes have occurred which make the threat of further harm to plaintiff non-existent.

The Court of Appeals reversed and remanded the case to the District Court with directions that it make additional findings in accordance with the opinion of the Court of Appeals.

QUESTIONS PRESENTED.

(1) Does not a decree of injunction bind, in addition to parties defendant, those persons in active concert or participation with them in the unlawful conspiracy enjoined?

(2) Does the filing of a petition to modify a decree of injunction place the burden on the person for whose protection the decree was entered of again proving that the threat and danger of further injury which necessitated the entry of the decree continue unabated?

(3) Does the entry of a consent decree in anti-trust liti-

gation prosecuted by the Department of Justice automatically require that a decree entered prior thereto for the protection of an injured person from threatened further injury by the same conspirators be vacated?

(4) Are not the Findings of Fact made by a District Court binding upon the Court of Appeals unless clearly erroneous?

(5) Does not an injunction continue to bind successor corporation to those originally bound, or may a proven conspirator escape from an injunction designed to prevent further unlawful conduct by merely carrying out a reorganization of its corporate structure?

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The Court of Appeals held that respondent is bound by this decree, if at all, only by virtue of its corporate relationship to defendant RKO Radio Pictures, Inc., in complete disregard of the findings, and extensive evidence in support thereof, that respondent was in active concert and participation with the conspirators in their concerted unlawful conduct. In so holding, the Court is in direct conflict with Rule 65 of the Federal Rules of Civil Procedure and the decision of this Court in *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U. S. 9, 65 S. Ct. 487, both of which clearly establish the rule of law that not only parties to the action but persons in active concert or participation with them are bound by a decree of injunction.

2. The holding of the Court of Appeals that petitioner must prove again the threat of further injury which the injunction was entered to prevent is in flagrant disregard of the opinion of this Court in *United States* v. *Swift & Company,* 286 U. S. 106, 52 S. Ct. 460, that the party seeking the

modification of a decree must make a showing that changes have occurred of such importance that the dangers necessitating the injunction have become attenuated to a shadow.

3. By holding that the entry of a consent decree in an anti-trust conspiracy action successfully prosecuted by the Department of Justice requires that a decree previously entered by another Court to protect an injured private litigant, the Court of Appeals has limited by a judicially legislated amendment the provision for effective injunctive protection against injury from violations of the anti-trust laws which Congress afforded injured persons by enacting Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. A. § 26.

4. The Court of Appeals has decided important questions of Federal law in such a manner as to preclude the obtaining and maintaining of effective injunctive relief in the Federal Courts, and, more especially, has so seriously impaired the effectiveness of the injunctive relief Congress provided for persons injured by violations of the anti-trust laws as to make such actions futile and thereby the benefit to the public and to competition in the trade and commerce among the several states will be lost. This Court recognized in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 67 S. Ct. 1015, that actions by injured persons constitute an important adjunct to the enforcement of the anti-trust laws.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

FLORENCE B. BIGELOW,
MARION B. KOERBER,
JOHN E. BLOOM, and
WILLIAM C. BLOOM,
Petitioners,
By THOMAS C. MCCONNELL,
Their Attorney.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. .....

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

RKO RADIO PICTURES, INC., ET AL.,
Defendants,

WINSTON THEATRE CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for a writ of certiorari.

JURISDICTION.

The jurisdiction of this Court is shown in the accompanying petition.

OPINION BELOW.

The opinion of the Court of Appeals appears in the record at pages 323-328 and is reported in 205 F. 2d 231.

SPECIFICATION OF ERRORS.

If a writ of certiorari is issued, petitioners intend to urge that the Court of Appeals for the Seventh Circuit erred:

(1) In failing to hold and in reversing the District Court for holding that respondent is bound by the decree of injunction entered herein as a person in active concert and participation with its co-conspirator parties defendant.

(2) In refusing to hold that a decree of injunction may not be modified unless the person bound by the decree seeking its modification makes a clear showing that changes have occurred of such significance that the dangers necessitating the injunction have become attenuated to a shadow, and further erred in holding that the burden of proof on a petition for modification of a decree lies with the person protected by the decree to prove again that the threat of further injury which necessitated the decree continues unabated.

(3) In holding that the reorganization of the RKO corporate hierarchy pursuant to the consent decree entered in the *Paramount* case constituted sufficient grounds upon which to predicate a modification of the decree of injunction previously entered herein.

(4) In holding the findings of the District Court to be clearly erroneous when the findings were clearly supported by the substantial weight of the evidence.

ARGUMENT.

I.

A Person Is Bound by an Injunctive Decree If He Was in Active Concert or Participation in the Conspiracy, Was in Privity with a Party Defendant, or Is a Successor of a Party Bound by the Decree.

It has long been an established rule of law that all persons in active concert and participation with parties defendant in their unlawful activity are bound by a decree entered to prevent the continuation of the illegal Acts. This rule of law was incorporated in Rule 65 of the Federal Rules of Civil Procedure which provides:

> "Every order granting an injunction and every restraining order * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise".

This Court in construing this Rule in *Regal Knitwear Co.* v. *N. L. R. B.*, 324 U. S. 9, 13-14, held that "* * * a decree of injunction binds not only the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control". The record clearly supports the findings of the District Court that respondent was bound by this decree on each of these grounds (R. 299-300). The Court of Appeals rejected all grounds for binding respondent under this decree except that the Court tacitly admits by its opinion that respondent was bound in the past because of, and only because of, its corporate affiliation with defendant RKO Radio Pictures, Inc.

The record clearly shows that Winston Theatre Corporation was in active concert and participation with the other conspirators who promulgated and enforced the old Chicago system of release. Matthew Polon, who is still the buyer and booker for the Grand Theatre and other RKO Theatres throughout the country, admitted on cross-examination that he operated the Grand Theatre under the old Chicago system of release.

"Q. So you were buyer for your two theatres in 1946?

A. That is right.

Q. Now, at that time you were buying pictures under the old Chicago system of release, were you not?

A. 1946?

Q. Yes, 1946.

A. That is right" (R. 121).

* * * * *

"Q. Did you know there was a uniform clearance of three weeks after the loop run?

A. I knew they had to have a three week clearance.

Q. You played and bought them under that system?

A. That is right" (R. 122).

This testimony coupled with the testimony at the trial (Cause 9690, R. 59-61) leaves no room for doubt that the Winston Theatre Corporation was in active concert with the parties defendant in their conspiracy.

Respondent had no corporate relationship to the other defendants in this case and yet it was in active concert with them in the conspiracy. While the corporate affiliation with defendant RKO Radio Pictures, Inc. furnishes an additional basis for holding respondent bound by the decree, the primary basis is as the District Court found in Finding No. 6 "that Winston Theatre Corporation was in active concert with and in conspiracy with the defendants herein in the maintenance and carrying on of the conspiracy evidenced by the Chicago System of release".

Respondent is bound because it was a conspirator and as this Court held in *United States* v. *Swift & Company*, 286 U. S. 106-119:

> "The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions which existed at its making".

The Court of Appeals by refusing to sustain the District Court's holding that respondent was a conspirator and therefore bound has repudiated Rule 65 of the Federal Rules of Civil Procedure and has rejected this Court's construction of that rule in the *Regal Knitwear* case, *supra*. The necessary consequence of this decision by the Court of Appeals is that a plaintiff to be sure of obtaining effective injunctive relief must in the future join, as parties defendant, every officer, director, agent, subsidiary or parent corporation and even employees of any corporation from whose wrongful acts he seeks protection.

II.

The Burden of Proof Is Upon the Person Seeking to Have an Injunctive Decree Modified to Show that Substantial Changes Have Occurred So that the Decree Is No Longer Necessary.

The Court of Appeals has by its decision in this case placed the burden upon those for whose protection a decree has been entered to re-establish the need for the injunctive relief whenever the decree is challenged by a petition to modify. The Court has in effect held that a petition to modify setting forth a change of conditions operates as a rule on the injured person to show cause why the decree should not be modified into a nullity. Such a holding has no foundation in the law.

The rules of law applicable to petitions to modify in-

junctive decrees have long been clearly established by this Court's decision in *United States* v. *Swift & Company*, 286 U. S. 106, 119. Under the doctrine of this case a person seeking the modification of a decree must make a clear showing that changes have occurred of sufficient significance "that dangers, once substantial, have become attenuated to a shadow". The moving party must also make "a clear showing of grievous wrong evoked by new and unforeseen conditions".

Petitioners denied respondent's contention that the change in corporate structure of the RKO corporations dissipated any danger of further injury to petitioners. No evidence was adduced by respondent that substantial danger to petitioners no longer existed. Under the law of the *Swift* case the District Court was constrained to and properly did refuse to modify the decree. The Court of Appeals reversed this holding of the District Court and remanded it for disposition in accordance with its opinion. The Court in its opinion holds, 205 F. (2d) 231, 233:

> "We think the effect of the decree in the *Paramount* case cannot be ignored, and should be given full consideration by the district court; also if the claim is pressed that the divorcement pursuant to the decree is merely window dressing, or not being carried out in good faith, then evidence should be received on that subject;"

Under this ruling a person bound by a decree may have it vacated as to him by modification by simply alleging in a petition and proving that some fact has changed since the decree was entered. He need not make any showing as to its relevancy to the need for the injunction in the first place or to the possibility of further wrongful acts at the time modification is sought. Instead the Court holds that petitioners, who prosecuted their claim against these conspirators for over four years, including an appeal to

this Court, and proved the conspirators had for many years been unlawfully acting in concert by fixing prices and in discriminating against petitioners and other independent motion picture exhibitors and who established the need for injunctive protection to save them from further damage, must bear the burden of re-establishing the necessity for the injunction. The Court of Appeals holds that whenever a different fact is asserted petitioners must show that this fact does not change the conditions so that the dangers of recurring wrongful conduct are abated.

This holding undermines the entire structure upon which injunctive relief was founded. The purpose of injunctive decrees is to make it unnecessary for plaintiff to continue to suffer damages and sue periodically to recover a judgment for as much of the damages as he can prove. Such decrees are afforded the victims of wrongdoing because the courts long ago recognized that often the most substantial damages sustained cannot be recompensed by judgments for money.

The Court of Appeals in shifting this burden of proof has ignored the well established rule that once proof is made that a conspiracy is operating there is a legal presumption that the partnership in criminal purposes continues in existence until proof is made by the conspirators that they have abandoned the conspiracy. See *United States* v. *Kissel,* 218 U. S. 601, 607-8; *Hyde* v. *United States,* 225 U. S. 347, 369.

In reference to the denial of a petition for modification of a decree this Court said in *United States* v. *Swift & Company,* 286 U. S. 106, 120:

> "What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing".

The ruling of the Court of Appeals in this cause has created a mechanism by which wrongdoers may lightly undo decrees of injunction.

III.

Mere Reshuffling of Assets in the Reorganization of a Corporate Hierarchy Bound by an Injunction Is Not Sufficient Grounds Upon Which to Vacate a Decree by Modification.

The Court of Appeals held 205 F. (2d) 231, 233, that:

> "In its findings the district court ignored the evidence that as of January 1, 1951 there was a divorcement of theatre operations from production-distribution operations, which prior to that date were carried on by affiliated companies."

and further held that:

> "We think the effect of the decree in the *Paramount* case cannot be ignored, and should be given full consideration by the district court;"

In its opinion the District Court expressly dealt with the evidence adduced by respondent as to the divorcement of certain branches of the RKO corporations (R. 172). The District Judge looked further than the surface and expressly found that in spite of the divorcement shown "the evidence in this case shows no changes in the situation so far as Winston Theatre Corporation is concerned which in any manner justify this Court in modifying its decree * * *" (Finding No. 6, R. 300).

The Court of Appeals has by remanding the case for disposition in accordance with its opinion held as a matter of law that proof of the entry of another decree against the same conspirators enjoined herein is of itself sufficient grounds upon which to base a modification which in reality

will vacate this decree. The Court holds that after a decree is entered for the benefit of an injured person pursuant to Section 16 of the Clayton Act one of the enjoined conspirators has only to show that the Department of Justice has also prosecuted him successfully for related violations of the anti-trust laws and that he has entered into a consent decree in order to be absolved of all taint and the first decree vacated as to him.

No rule of law or equity can be found which will sustain this holding by the Court. It judicially legislates a limitation upon the statutory right to injunctive protection granted by Congress in Section 16 of the Clayton Act to persons injured by unlawful conduct violative of the anti-trust laws.

IV.

Findings of Fact Are Binding Upon the Court of Appeals When They Are Supported by the Substantial Weight of the Evidence and Are Therefore Not Clearly Erroneous.

The Court of Appeals held Finding No. 6 of the District Court to be "clearly incorrect". This Finding reads as follows:

> 6. That the evidence in this case shows no changes in the situation so far as Winston Theatre Corporation is concerned which in any manner justify this Court in modifying its decree heretofore entered herein, nor does the present record show anything other or different than was shown at the time of the original hearing herein, in which it was disclosed that Winston Theatre Corporation was in active concert with and in conspiracy with the defendants herein in the maintenance and carrying on of the conspiracy evidenced by the Chicago system of release (R. 300).

The District Court saw that the mere substitution of two

holding companies where one stood before was no change of any substance. The District Court's finding is completely sustained by a brief recitation of the evidence.

The decree in the *Paramount* case embraced a plan for corporate reorganization of the RKO hierarchy conceived by the attorneys who had represented all of the RKO companies in that case (R. 84-85). Pursuant to this plan the parent of all the RKO companies was to be divided in two parts and replaced by two newly created holding companies (Pet. Ex. 1, R. 176). The shareholders of the old holding company received one share in each of the two holding companies created for each share they had in Radio-Keith-Orpheum Corporation (Pet. Ex. 20, R. 242). Thereafter RKO Theatres Corporation was organized on November 18, 1950 and filed in the *Paramount* case a consent to be bound by the terms of the decree entered therein (Pet. Ex. 2, R. 196). RKO Pictures Corporation was also organized and together with RKO Theatres Corporation entered into an agreement with Radio-Keith-Orpheum Corporation whereby they acquired the assets and liabilities of all the RKO companies including any and all obligations and liabilities under the anti-trust laws (Pet. Ex. 21, R. 254-275, at 258). RKO Theatres Corporation pursuant to this plan received all of the theatre assets of RKO including all of the stock of RKO Theatres Inc., which has been the direct parent of petitioner since it was organized on March 2, 1943 and was its parent at the time of the contempt proceeding in this case (Pet. Ex. 21, R. 255; Pet. Ex. 20, R. 249; Cause No. 9690, R. 51).

The same men are directing the affairs of the RKO Theatre interests that directed them in 1948 when RKO was found to be in contempt of this decree. The following chart based on Pet. Ex. 5, R. 201; Pet. Ex. 6, R. 202 and Cause No. 9690, R. 54-57 demonstrates this continuity of control:

Name	Present Office in Winston	Present Office in RKO Theatre Co.	Office Held in 1948	Company
Sol A. Schwartz	Pres. & Director	President	V. Pres.	RKO Theatres, Inc.
			V. Pres.	Winston
			V. Pres.	Chicago Orpheum
T. F. O'Connor	V. Pres.	V. Pres.	Treasurer	RKO Theatres, Inc.
	Treasurer	Treasurer	Treasurer	Winston
	Director		Treasurer	Chicago Orpheum
			Asst. Treas.	Radio-Keith-Orpheum Corp.
Wm. W. Howard	V. Pres.	V. Pres.		
	Director			
Wm. F. Whitman	Secretary	Secretary	Asst. Sec.	RKO Radio Pict., Inc.
	Director		Asst. Sec.	RKO Theatres, Inc.
			Asst. Sec.	Winston
			Asst. Sec.	Chicago Orpheum
			Asst. Sec.	Radio-Keith-Orpheum Corp.
H. E. Newcomb	Comptroller	Comptroller	Asst. Treas.	Radio-Keith-Orpheum Corp.
	Director		Asst. Treas.	RKO Theatres, Inc.
	Asst. Treas.		Asst. Treas.	Winston
			Asst. Treas.	Chicago Orpheum
Louis Jaffee	Asst. Sec.	Asst. Sec.	Asst. Sec.	RKO Theatres, Inc.
			Asst. Sec.	Winston
			Asst. Sec.	Chicago Orpheum
M. L. Maier	Asst. Sec.	Asst. Sec.		
A. E. Reoch	Asst. Treas.	Asst. Treas.	Asst. Treas.	Radio-Keith-Orpheum Corp.
			Asst. Treas.	RKO Theatres, Inc.
			Asst. Treas.	Winston
			Asst. Treas.	Chicago Orpheum
J. E. Redmond	Asst. Treas.	Asst. Treas.		
O. R. McMahon	Comptroller		Asst. Treas.	RKO Theatres, Inc.
			Asst. Treas.	Winston
			Asst. Treas.	Chicago Orpheum
			Asst. Treas.	Radio-Keith-Orpheum Corp.
Arthur Bell	Asst. Treas.	Asst. Treas.		
Edward W. Avery	Asst. Treas.	Asst. Treas.	Asst. Treas.	RKO Theatres, Inc.
			Asst. Treas.	Winston
			Asst. Treas.	Chicago Orpheum

The largest single stockholder in the RKO Picture Company is Howard Hughes holding 929,020 shares and the largest single stockholder in the RKO Theatre Company is Howard Hughes holding 929,020 shares (R. 95). The Department of Justice of the United States by affidavit of Philip Marcus, Special Assistant to the Attorney General, stated:

> "• • • that there can be no real separation of the RKO Pictures Company from the RKO Theatre Company and no complete termination of control of both those companies by Howard R. Hughes, while the latter may retain a substantial interest in both companies without a requirement to dispose of his interests in either company." (R. 99.)

William F. Whitman, attorney for petitioner, admitted on cross-examination that he considered Winston Theatre Corporation was subject to the injunction entered in the instant case (R. 105).

Matthew Polon, who has been with RKO for over 23 years as buyer and chief booker for RKO theatres in various parts of the United States, and has been buying and booking for the Grand Theatre for the past seven or eight years, is still doing the same job today (R. 115-116). J. Miller Walker, who has been with RKO for twenty years and was formerly Secretary of Winston Theatre Corporation is now Secretary, General Counsel and Vice President of the RKO Pictures Corporation. Many of the other officers and directors of RKO Pictures Corporation (R. 106) and RKO Radio Pictures, Inc. have held offices in the various theatre and picture companies of the RKO hierarchy for many years (Pet. Ex. 4, R. 199; Cause No. 9690, R. 54-57).

In the face of such overwhelming evidence the Court of Appeals has flagrantly disregarded Rule 52 (a) which compels the Court of Appeals to accept findings of fact unless clearly erroneous.

Conclusion.

The ruling of the Court of Appeals for the Seventh Circuit in the case at bar is manifestly erroneous on several grounds and in effect reverses well established principles of law laid down by this Court. The scope and effectiveness of injunctive relief in general and more particularly the injunctive relief Congress has afforded persons injured by price fixing conspiracies and other conduct violative of the anti-trust laws will be seriously impaired. The benefits accruing to the public from this important adjunct to the enforcement of the anti-trust laws will be lost because the Court of Appeals has dissipated the effectiveness of this injunctive relief.

Apparently, unless the supervisory powers of this Court can be invoked, all anti-trust suit plaintiffs are to be made the victims of the repeated attempts of the Court of Appeals for the Seventh Circuit by judicial interpolation to undermine and destroy any effective application of the anti-trust laws in breaking up monopolies and widespread restraints of trade in the ending of which the public has a manifest and vital interest.

It is, therefore, respectfully urged that this Court's supervisory powers should be exercised and that this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS C. MCCONNELL,
Attorney for Petitioner.

OCT 27 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 362

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

RKO RADIO PICTURES, INC., ET AL.,
Defendants,

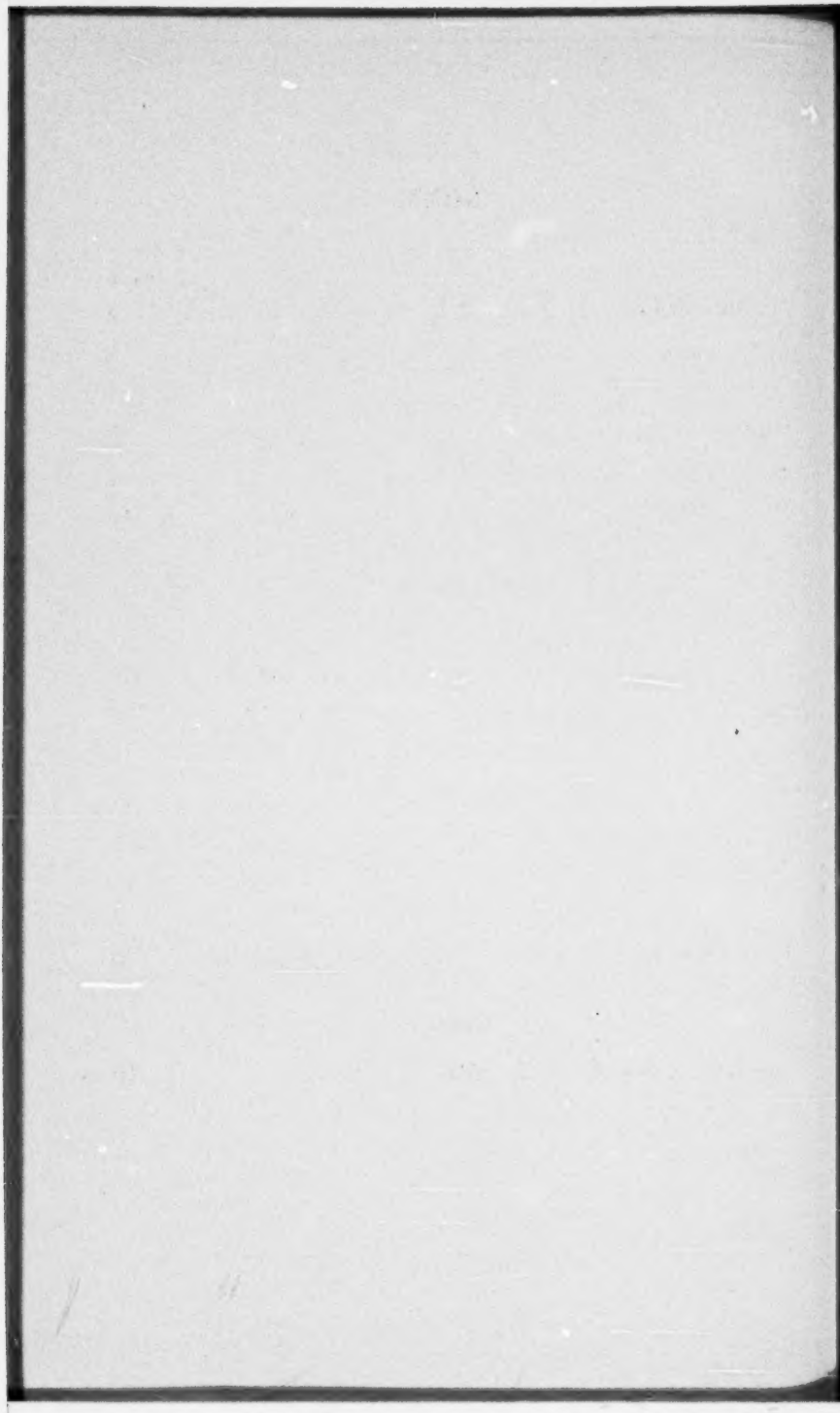
WINSTON THEATRE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE L. SIEGEL,
EDWARD C. RAFTERY,
Attorneys for Respondent, Winston Theatre Corporation.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO



INDEX.

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement of the case	2
Argument	4
Conclusion	11

CITATIONS.

Cases.

American Press Association v. U. S., 245 Fed. 91	10
Bigelow v. Balaban & Katz Corp., 199 F. 2d 794	5, 6
Ladner v. Siegel, 298 Pa. 487, 148 Atl. 699	10
Tobin v. Alma Mills, 194 F. 2d 133	10
U. S. v. Swift & Co., 286 U. S. 106	6, 10

Rules.

Federal Rules of Civil Procedure, Rule 60(b)(5)	10

Texts.

Annotation, 68 A. L. R. 1180	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 362.

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

RKO RADIO PICTURES, INC., ET AL.,
Defendants,

WINSTON THEATRE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals is reported in 205 Fed. 2d 231.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 USC Par. 1254(1). The judgment of the Court of Appeals was entered on June 23, 1953.

QUESTIONS.

The questions stated by petitioners are not involved in this case. The questions urged by the respondent and decided by the Court of Appeals are as follows:

1. Whether, as a result of the divorcement, the Grand Theatre is no longer "a theatre owned, leased or operated by any defendant" within the meaning of the decree of October 16, 1946.

2. Whether the change in conditions, including the divorcement and the hardship suffered by the Grand Theatre, make it no longer equitable that the injunction should continue with respect to the Grand Theatre.

Statement of the Case.

Winston Theatre Corporation, operator of the Grand Theatre in Chicago, filed its intervening petition for an adjudication that it is not subject to the decree of October 16, 1946, which, among other provisions, imposed certain restrictions on theatres "owned, leased or operated by any defendant."

Winston Theatre Corporation was organized almost a year after this suit was filed, and commenced operating the Grand Theatre in May 1950. It is not a defendant in this case. (R. 74-75.) It had been subject to the decree entered October 16, 1946, because it was controlled by the same parent company that controlled one of the defendants, RKO Radio Pictures, Inc., a condition that no longer prevails.

Pursuant to the decree of divorcement in the *Paramount* case, the affiliation of Winston Theatre Corporation with the defendant RKO Radio Pictures, Inc. was completely

severed commencing January 1, 1951. Since that date, Winston Theatre Corporation has in no way been connected with the defendant RKO Radio Pictures, Inc. or its parent companies. RKO Radio Pictures, Inc. and its parent companies do not own any stock in Winston Theatre Company or its parent companies; nor does Winston Theatre Company or its parent companies own any stock in RKO Radio Pictures, Inc., or its parent companies. Each is enjoined from having any common directors, officers, agents or employees; and each is enjoined "from attempting to control or influence the business or operating policies of the other by any means whatever." The facts of the divorcement are set forth in the opinion of the Court of Appeals and are established by uncontradicted evidence. (Pet. Ex. 1, R. 176, 195, 196; Pet. Ex. 4, R. 199-200; Pet. Ex. 5, R. 201; Pet. Ex. 6, R. 202; Pet. Ex. 20, R. 241-2; Pet. Ex. 21, R. 254-256; R. 75-80; R. 117, 121.)

The record also shows the great hardship suffered by the Grand Theatre subsequent to the divorcement. Prior to the divorcement, a stipulation approved by the court permitted the film distributors to license films at the Grand Theatre for more than two weeks. Subsequent to the divorcement, the stipulation became ineffective, and the film distributors have not permitted the Grand Theatre to bid for pictures on runs longer than two weeks because claim had been made that the 1946 decree prevents them from doing so. Accordingly, the Grand Theatre has been unable to bid effectively for the better pictures, and for the first six months of 1952, its operating loss was $108,000, compared with a modest profit of approximately $12,000 for the previous year when it was able to exhibit some pictures on longer runs. (R. 118, 120, 135, Pet. Ex. 11, R. 207.)

The trial court recognized the hardship upon the Grand Theatre, stating (R. 173), "I sympathize with your difficulty. I do not know what the way out for them is"—but

denied relief. The Court of Appeals reversed and remanded, holding that the decree did not necessarily apply to the Grand Theatre in perpetuity, and that if the decree of divorcement is being carried out in good faith, and the Grand Theatre is not controlled by any defendant, the Court should find that the Grand Theatre is not a theatre owned, leased or operated by a defendant.

Argument.

The petition does not present any reason to justify a review by this Court. No conflict of decisions nor questions of general importance are involved. The Court of Appeals reversed and remanded; and although evidence was introduced at the trial and petitioners had full opportunity to introduce such evidence as they desired, the Court of Appeals ruled that the district court in its discretion may give petitioners another opportunity to present evidence with respect to their contention that the divorcement has not been carried out in good faith.

The petitioners have completely distorted the questions decided by the Court of Appeals. On pages 7 to 9 of their petition, the petitioners set out five "questions presented" and four reasons why this Court should grant certiorari. Question 1 and reason 1 state in effect that the Court of Appeals held that the original decree entered in 1946 did not previously bind the respondent. That question was not involved. Relief was sought and granted because of a change in conditions occurring subsequent to the entry of the decree, the Court of Appeals stating:

> "At the time of the decision below, the district court did not have the benefit of the opinion of this court in *Bigelow* v. *Balaban & Katz Corp.*, 199 F. 2d 794, and may have felt that relief could not be granted to Wins-

ton, irrespective of any divorcement of the theatre operations and the producing-distributing operations of Radio-Keith-Orpheum Corporation. However, in the *Bigelow* v. *Balaban & Katz* case p. 796, this court said, with respect to the divorcement of the production-distribution and exhibiting branches of Paramount, 'We think appellant is correct in saying that this is a change which could not have been contemplated at the time of the entry of the decree * * *.' We further indicated that restrictions of the decree were not necessarily to remain in perpetuity, and said, p. 797, 'However, if the trial court's decision is to be construed as meaning that there can never be a modification of the provisions of the injunctive decree, we think it goes too far. We cannot agree with the extreme position stated by counsel for Jackson Park Theatre on argument, that the decree provides for perpetuity, and that only the sale of the theatre would constitute such a change in condition as might render the decree inapplicable'."

Petitioners' questions 3 and 5 and reason 3 claim that the decision sought to be reviewed held that the entry of a consent decree in another anti-trust suit "automatically" required that the 1946 decree entered in this cause be vacated. The Court of Appeals did not so rule, but in fact held exactly *the opposite* in *Bigelow* v. *Balaban & Katz*, 199 F. 2d 794, upon which in part the decision herein is based, the Court having stated:

> "We think appellant is correct in saying that this is a change which could not have been contemplated at the time of the entry of the decree since the Expediting Court had rejected the plea of the Department of Justice for divestiture in its original decree, entered June 11, 1946, *United States* v. *Paramount Pictures, Inc.*, 66 Fed. Supp. 323, 353. However, it does not follow that it is such a change as to require immediate relaxation of restrictions."

Petitioners' question 2 and reason 2 likewise are not in-

volved. At no place in the opinion of the court below was the burden of proof placed on the petitioners. Respondent offered considerable evidence in support of its petition for relief, and proved its case by uncontradicted evidence.

Nor did the Court of Appeals at any point change the ordinary rule of law that the findings of fact made by the District Court should not be disturbed by the Court of Appeals unless clearly erroneous. Accordingly question 4 is not involved.

The contention of petitioners in reasons 2 and 4, that the decision impairs the effectiveness of injunctive relief and is contrary to the decisions of this Court, is utterly baseless. Respondent with uncontradicted evidence met the test of *United States* v. *Swift & Company*, 286 U. S. 106 and *Bigelow* v. *Balaban & Katz*, 199 Fed. 2nd 794, by showing (1) substantial changed conditions that could not have been contemplated at the time of the entry of the original 1946 decree; namely, a complete divorcement that severed the previous affiliation of respondent with companies in the film producing and distributing business, and left respondent engaged solely in the operation of a motion picture theatre, and (2) hardship sustained as a result of the restrictive provisions of the decree against showings for more than two weeks, whereby respondent had lost more than $108,000 in six months of operation in 1952, and if the condition continued, respondent would be forced out of business completely.

I.

The uncontradicted evidence clearly establishes the fact that the consent decree in the *Paramount* case has completely severed the affiliation of the respondent with the defendant RKO Radio Pictures, Inc.

The two-week limitation is imposed only upon theatres

owned, leased or operated by a defendant. It does not apply to a theatre which is not owned, leased or operated by a defendant. (Pet. Ex. 14, R. 231; Pet. Ex. 15, R. 231-2; Pet. Ex. 18, R. 237.)

Since January 1, 1951 the Grand Theatre has not been owned, leased or operated by any defendant. Neither the petitioner, Winston Theatre Corporation, nor its parent companies are defendants in the case. Prior to the divorcement, Winston Theatre Corporation and the defendant RKO Radio Pictures, Inc. were affiliated companies controlled by a common parent corporation, but since the divorcement which became effective January 1, 1951, defendant RKO Radio Pictures, Inc. has had no interest whatever, directly or indirectly, in the operation of the Grand Theatre. Pursuant to the consent decree in the *Paramount* case, all the theatre assets, including the stock of Winston Theatre Corporation, were transferred to the new theatre corporation known as RKO Theatres Corporation, and all the production-distribution assets, including the stock of RKO Radio Pictures, Inc., were transferred to the new picture company. The holding company which had previously controlled both the production-distribution of pictures and the exhibition of pictures was dissolved. The new theatre company owns no stock in the new picture company, and the new picture company owns no stock in the new theatre company. They have no common officers or directors.

The divorcement decree provides that "on and after January 1, 1951, the new theatre company and the new picture company shall be operated wholly independently of one another and shall have no common directors, officers, agents or employees. Each of them shall thereafter be enjoined from attempting to control or influence the business or operating policies of the other by any means whatsoever." (R. 191.)

The Grand Theatre now competes for films distributed by RKO Radio Pictures, Inc. in the same manner that it competes for films of other distributors. (R. 117.) Of an aggregate of $209,000 paid by the Grand Theatre for film rental during the year 1951, only $9,800 or 4.7% was paid to RKO Radio Pictures, Inc.; of $80,700 paid during the first six months of 1952, only $1,100 or 1.4% was paid to RKO Radio Pictures, Inc. (R. 121.)

The uncontradicted evidence clearly proves that since January 1, 1951, the Grand Theatre has not been "owned, leased or operated by any defendant".

The position now taken by petitioners is a reversal of their position in a declaratory judgment suit filed by respondent seeking the same relief, that suit being dismissed without a hearing on the merits. Petitioners there made the following admissions (R. 227):

> "The *Bigelow* decree establishes certain rights and duties between the plaintiffs in that action and certain corporate defendants. The instant plaintiff (Winston Theatre Corporation) was not a party to that case and the decree in that case does not operate against the instant corporate plaintiff."

The petitioners further admitted (R. 230):

> "Nothing in the *Bigelow* decree operates upon or is directed against any property of the Winston Theatre Corporation or against the Winston Theatre Corporation itself. The *Bigelow* decree is merely operative as between the parties to the *Bigelow* case and, as pointed out in the plaintiff's original brief, equity acts *in personam* when granting injunctions."

As plaintiffs have conceded, "nothing in the *Bigelow* decree operates upon or is directed against any property of the Winston Theatre Corporation or against the Winston Theatre Corporation itself." The decree would apply only if the Grand Theatre were owned, leased or operated by a

defendant. Since January 1, 1951, the Grand Theatre has not been owned, leased or operated by any defendant, and the decree therefore does not apply to that theatre.

The opinion of the court below reviews all this evidence in detail and reaches this conclusion:

> "But we think that if a complete divorcement has in fact been had of the business of operating theatres from the business of producing and distributing motion pictures, and the decree of the New York court is being carried out in entire good faith, and the new picture company does not control or influence the operating policies of the theatre company or Winston, the district court could properly decree that the Grand Theatre is not a theatre owned, leased or operated by a defendant. In view of the decision of this court in *Bigelow* v. *Balaban & Katz Corp., supra,* which was subsequent to the findings and order of dismissal of the district court herein, and in order to permit the court to make additional findings on the issue hereinbefore indicated, this cause will be remanded. The court should be free to make such findings on the record heretofore made, or, in its discretion, to permit additional testimony to be taken on that issue."

II.

In addition to these important changes which make the 1946 decree no longer applicable to the Grand Theatre, the record also shows severe hardship suffered by the Grand Theatre.

The existence of this hardship, proven by uncontradicted evidence, is recognized by the Court of Appeals in its opinion as follows:

> "Winston points out that it operates only one theatre, the Grand, which is one of eight first run theatres in the Chicago Loop; that the seating capacity of the Grand is 1,175; that the distributors of films will not permit the Grand to bid for runs of more than two

weeks because claim has been made that the 1946 decree prevents them from so doing. Winston claims that it cannot compete with the Balaban & Katz theatres, which are also limited to runs of two weeks, because their larger seating capacity permits them to outbid the Grand, and that it cannot compete with other theatres which are not limited to the two week runs, because by that very fact they are able to bid higher for pictures than the Grand. Winston asserts that during 1951 when the Grand played a number of pictures on extended runs, pursuant to a court approved stipulation, it showed a small net profit of approximately $12,000 but for the period of approximately six months from January 1, 1952, to June 28, 1952, when it was unable to obtain pictures for runs of over two weeks, its business loss was $108,000. Winston asserts that this loss was due to the inability of the Grand Theatre to compete for better pictures because of the two-week limitation, and that if this condition continues, it will be forced out of business."

Rule 60(b) (5) of the Rules of Civil Procedure provides that the court may relieve a party from a final judgment, order or proceeding when "it is no longer equitable that the judgment should have prospective application." The cases uniformly hold that a court will modify an injunction when changing conditions make it just and equitable to do so. *United States* v. *Swift & Co.*, 286 U. S. 106; *American Press Association* v. *U. S.*, 245 Fed. 91 (C. C. A. 7); *Tobin* v. *Alma Mills*, 194 Fed. 2d 133; *Ladner* v. *Siegel*, 298 Pa. 487, 148 Atl. 699; Annotation, 68 A. L. R. 1180.

Because the distributors are applying the restrictions of the decree to the Grand Theatre, it has been unable to bid for the better pictures and is sustaining a substantial loss in its operations. (R. 118, 120, Pet. Ex. 11, R. 207.) For the first six months of 1952, its loss exceeded $108,000. Even the trial court recognized the difficulties confronting respondent's theatre, and stated, "I sympathize with your

difficulty. I do not know what the way out for them is." (R. 173.) The Court of Appeals held that there is a way out, and that relief should have been granted.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE L. SIEGEL,
EDWARD C. RAFTERY,
Attorneys for Respondent, Winston Theatre Corporation.